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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1885

THOMAS D. McDONALD,
PETITIONER

VERSUS

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the petitioner's conviction is reported as follows:

McDonald v. State 57 Ala. App. ——, 329 So 2d 583 (1975)

The order of the Supreme Court of Alabama quashing, as improvidently issued, the writ of certiorari issued to re-

view the opinion of the Court of Criminal Appeals of Alabama is reported as follows:

McDonald v. State, 295 Ala. ——, 329 So. 2d 596 (1976)

JURISDICTION

The petitioner seeks the writ under Title 28 United States Code, Section 1257(3).

QUESTION PRESENTED

Was there any evidence to support the Petitioner's conviction for bribery?

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making his claim under the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

The petitioner was convicted under Title 14, Section 64, Code of Alabama, 1940, which reads as follows:

> ". . . Any legislative, executive or judicial officer or any deputy officer, or the clerk, agent or employee of any such legislative, executive or judicial officer who corruptly accepts or agrees to accept any gift, gratuity, or any other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision, or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall, on conviction, be imprisoned in the penitentiary for not less than two years nor more than ten years."

STATEMENT OF THE CASE

The petitioner was indicted under Title 14, Section 64, of the Code of Alabama for bribery. The count under which he was ultimately convicted is extensive and is submitted as an Appendix to this brief. The indictment charged that the petitioner, a Judge, did "accept or agree to accept" sexual favors from one Myra Layton Braidfoot, a woman, with the understanding that he would favorably dispose of a Grand Larceny charge then pending against Mrs. Braidfoot before the petitioner's court. (R. p. 2)

On the trial of the case, Mrs. Braidfoot testified that on three occasions she was asked into his chambers by the Petitioner. On each of these occasions the petitioner commented on how attractive she was, and on the third occasion the following occurred:

> "Q. What happened the third time, please ma'am?
>
> "A. Well, we were in his Chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.

"THE COURT: Asked you what?

"A. If I could meet him at Kings Inn at 10:00.

"Q. The Defendant asked her if she could meet him at the Kings Inn at 10:00.

"THE COURT: All right. I'm just a little hard of hearing.

"Q. Did he touch you or anything that time, squeeze you?

"A. He put his arm around my waist.

"Q. This Defendant, Thomas McDonald?

"A. Yes, sir.

"Q. And were you alone in his office?

"A. Yes, sir.

"Q. And what again did he say now, other than meeting at the Kings Inn?

"A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.

"Q. Of the case?

"A. Yes, sir.

"Q. All right. If you met him at the Kings Inn at 10:00, what did you tell him?

"A. I told him that I would.

"Q. What, if anything, did you do then?

"A. I left Huntsville and went to Decatur to my attorney Ralph Slate and told him of the situation." (R. pp. 186 and 187)

On hearing Mrs. Braidfoot's report, the attorney arranged to have the case transfered out of the Petitioner's court. The attorney accomplished this by waiving preliminary hearing before the petitioner.[1] (R. pp. 181-189, 586-587 and 590-591)

Other witnesses were presented by the State to show that the incident with Mrs. Braidfoot was a part of a recurring pattern in which female defendants in the petitioner's court were approached with nearly identical language, and subsequently met the petitioner clandestinely and had sexual relations with him and, as a result, had their cases or cases in which they were interested disposed of in a most favorable manner. (R. pp. 241-259 and 423-439)

Other witnesses obtained favorable results after the petitioner kissed and fondled them. To one witness the petitioner offered a motel room key with the suggestion that she meet him there. In return, the petitioner indicated that he would not only help the witness with her long list of forgery charges but would be available to help the witness'

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[1] Since felony charges in Alabama must be brought by indictment, there is probably no U. S. Constitutional right to a preliminary or probable cause hearing in Alabama. See **Ex parte Campbell** (278 Ala. 114, 176 So. 2d 242 [1965]) **Campbell** was cited with approval in **Coleman v. Alabama** (399 U.S. 1, 8, 26 L. Ed 2d 387, 396, 90 S. Ct. 1999 [1969]) See also **Gerstein v. Pugh,** (____U.S.____, 42 L. Ed 2d 54, 70, 95 S. Ct.____[1975]) However, the right to a preliminary hearing is a valuable statutory right in unindicted arrestees. See **State v. Bush,** (12 Ala. App 309, 68 So 492 [1915] and **Fletcher v. State,** (52 Ala. App. 303, 291 So 2d 757 [1973].

friends with bail bond reduction, etc.[2] (R. pp. 442-444 and 447-455).

The petitioner denied everything except meeting the witnesses in his chambers and discussing their cases. (R. pp. 901-1177)

Following a guilty verdict and judgment of conviction the petitioner was sentenced to three (3) years imprisonment (R. pp. 1499).

On appeal, the Court of Criminal Appeals of Alabama, found that there was sufficient evidence to support a verdict that the petitioner agreed to accept sexual favors from Mrs. Braidfoot in return for a favorable disposition of her case. *McDonald v. State*, 57 Ala. App ——, 329 So 2d 583 (1975).

The Supreme Court of Alabama issued a writ of Certiorari to review the Court of Appeals decision but quashed the writ on April 9, 1976.[3] *McDonald v. State*, 295 Ala. ——, 329 So. 2d 596 (1976).

The petition was docketed in this Honorable Court on June 29, 1976.

ARGUMENT

The petitioner stands convicted of bribery. Bribery is

[2] The extent of the scheme was revealed indirectly by the fact that, although the Tourway Inn was mentioned by the petitioner to only one of the state's witnesses, the petitioner had a pass key to the rooms of that motel and an arraignment with the management whereby back rooms were made available to him on a regular basis without the petitioner's registering. (R. pp. 595-600)

[3] The Southern Reporter dates this order March 9, 1976. 329 So 2d 596. However, the order was, in fact, issued on April 9, 1976.

one of the most serious of crimes; in addition to its immediate effects, it tends to undermine public confidence in the Government in an invidious way. The basic principle of our system of government is that of equal protection of the law. Yet, what equality can there be if the laws are prostituted through bribery? And, since bribery is by its nature a secret crime, the victims of the unequal treatment can not protest it. For the same reason, bribery is an extremely difficult crime to detect and prove. The witnesses to the bribe itself are invariably conspirators who have a vested interest in secrecy and a Constitutional right against self incrimination. These considerations, coupled with the fact that the gravamen of the offense is the corruption of a public office rather than the actual giving of the consideration which may under other circumstances be perfectly legal, led the Alabama Legislature to define as bribery the accepting or agreeing to accept a consideration in return for an act by a public official. This is identical in substance to the Federal bribery statute. 18 U.S.C. 203(a).

The petitioner argues that there is no evidence whatsoever that he agreed to accept sexual favors from Mrs. Braidfoot in return for his favorable ruling on her case. He argues that Mrs. Braidfoot is an ex-convict, which she is, and a person of low moral character, which she may be, although her character was sufficiently high to prevent her submitting to the petitioner's scheme. Matters relating to a witness' character go to the weight to be given the witness' testimony, which is question for the jury.

The petitioner spotlights Mrs. Braidfoot's statement:

> "He [i.e. the petitioner] said if I met him at Kings Inn we could talk about the situation and maybe take care of it [i.e. her case]." (R. p. 187)

The petitioner argues that this statement does not comprise an offer to accept sexual favors from Mrs. Braidfoot in return for a favorable ruling on her case.

It must be observed at this point, that if the prosecution were required to prove that the parties to a bribe entered a specific agreement stating in so many words that the bribe giver was to give such and such as a bribe in return for specific action by the bribe receiver, bribery prosecutions would be impossible. There have been few if any bribery cases in history where the bribe was called a bribe, the words "gift", "contribution", "honorarium", "loan" or similar words are invariably used to tag the bribe. This salves the consciences of the participants and makes proof more difficult. As often as not the consideration for the bribe is not specific at all; the bribe may be designed to generally influence official acts rather than obtain a specific act or omission. See 12 Am. Jur. 2d, Bribery, Sections 6, 7, 8, 9 and 10.

Turning to Mrs. Braidfoot's statement, we find that the petitioner asked her to meet him at a motel. The petitioner knew Mrs. Braidfoot only as a defendant in his court. When a man asks a woman to meet him at a motel or hotel, it is commonly understood now-a-days that he is inviting her to an assignation. The petitioner advised Mrs. Braidfoot that maybe they could "take care" of her case. The expression "to take care of a case" means in common parlance, to settle or otherwise dispose of a case in a mutually acceptable manner. The statement, ". . . we could talk about the situation . . ." connects the proposed tryst and the proposed settlement. It would take extreme naivete to avoid reading this statement as an offer to exchange favorable judgment for sexual favors.

Mrs. Braidfoot understood the petitioner to be offering

favorable judgment for sexual favors, and reported it to her lawyer. The lawyer so understood the petitioner's offer and waived his client's right to a preliminary hearing to get her case out of the petitioner's court.

Mrs. Braidfoot's testimony in and of itself was sufficient to support the verdict, but the evidence went further and showed a similar pattern with other women, including cases where the bribery scheme was actually consummated. This evidence tended to show that Mrs. Braidfoot's understanding of the petitioner's statement was accurate.

The petitioner has cited numerous cases, none in point, for the proposition that where there is no evidence of an essential element of the corpus delecti a conviction violates due process. Many of these cases involve political and social desent. *Gregory v. Chicago,* 394 U.S. 111, 22 L. Ed 2d 134, 89 S. Ct. 946 (1969); *Brown v. Louisiana,* 383 U.S. 131, 15 L. Ed 2d 637, 86 S. Ct. 719 (1966); *Shuttlesworth v. Birmingham,* 382 U.S. 87, 15 L. Ed 2d 176, 86 S. Ct. 211 (1965); *Barr v. Columbia,* 378 U.S. 146, 12 L. Ed 2d 766, 84 S. Ct. 1734 (1964); *Taylor v. Louisiana,* 307 U.S. 154, 8 L. Ed 2d 395, 82 S. Ct 1188 (1962); *Garner v. Louisiana,* 368 U.S. 157, 7 L. Ed 2d 207, 82 S. Ct. 248 (1961). All of these cases were prosecutions for *mala prohibita* offenses. *Shuttlesworth v. Birmingham,* supra (blocking a sidewalk) *Vachon v. New Hampshire,* 414 U.S. 478, 38 L. Ed 2d 666, 94 S. Ct. 664 (1974) (contributing to the delinquency of a minor), *Garner v. Louisiana,* supra, *Taylor v. Louisiana,* supra, *Barr v. Columbia,* supra, *Brown v. Louisiana,* supra, (disturbing the peace) *Gregory v. Chicago,* supra, *Thompson v. Louisiana,* 362 U.S. 199, 4 L. Ed 2d 654, 80 S. Ct. 624 (1960). (Disorderly conduct), *Johnson v. Florida,* 391 U.S. 596, 20 L. Ed 2d 838, 88 S. Ct. 1713 (1968) (vagrancy). Bribery is a *mala*

in se offense, the gravamen of which is the corrupt influence of official actions. 12 Am. Jur. 2d, Bribery, Section 1. On this ground alone these cases are distinguishable from the petitioner's case.

More importantly, each element of the corpus delecti was proven against the petitioner. That corpus delecti is:

I. The accused is a Legislative, Executive or Judicial official who

II. accepts *or* agrees to accept

III. any gift, gratuity *or* other thing of value or promise of the same

IV. under an agreement *or* with the understanding that

V. his act, vote, opinion, etc. be given in

VI. any particular manner or upon any particular side of any cause, etc.

It is conceded that the petitioner was a Judicial officer. The evidence clearly showed that he agreed to accept a thing of value (Mrs. Braidfoot's sexual favors) with the understanding that his acts would be on the side of her cause. To reach any other conclusion would require disregarding Mrs. Braidfoot's testimony. This testimony was heavily corroborated and accepted by the jury. Clearly, the evidence proving the petitioner's guilt was weighty; it met and far exceeded the Constitutional minimum of some evidence.

CONCLUSION

In conclusion the State of Alabama respectfully submits

that the order, judgment and opinion of the Court of Criminal Appeals of Alabama are patently correct, and the State prays that the writ be denied.

Respectfully submitted,

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APPENDIX

INDICTMENT

STATE OF ALABAMA
CIRCUIT COURT, FEBRUARY TERM, 1973
MADISON COUNTY

The Grand Jury of said County charge, that before the finding of this indictment,

COUNT ONE

Thomas D. McDonald, alias Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecution being otherwise identified as the *State of Alabama vs.*

Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants, Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or caused to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General, one of the attorneys for the State of Alabama, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day of —— of ————, 1976, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendix on the Attorney for the Petitioner, by mailing the same to him, first class postage prepaid, and addressed to him as follows:

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